In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 906

UNITED STATES OF AMERICA, PETITIONER

v.

BERT N. ADAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY OF THE UNITED STATES TO THE BRIEF IN OPPOSITION

We confine our reply to respondents' suggestion that the petition for a writ of certiorari is out of time.

Respondents' cause of action in the Court of Claims was predicated on two theories: patent infringement and breach of contract. On April 17, 1964, the Court of Claims held for the respondent on the first theory. It found it unnecessary, at that time, to pass on the breach of contract question "because", it said, "the amount of recovery would not be changed by a decision on that issue" (Pet. 18, n. 2). Respondents,

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however, wished the court to determine whether recovery could be predicated on both grounds, and on May 11, 1964, filed a timely motion for an amended judgment or a rehearing. The Court of Claims denied the motion on October 16, 1964 (Pet. 39–40), holding that the facts did not establish the existence of a contract. Within the statutory period, measured from that date, the government filed its petition for a writ of certiorari.

Respondents' contention that the United States should have petitioned from the initial judgment, prior to disposition of the respondents' motion for amendment of the judgment or rehearing, is as unfounded in theory as it would be unsound in practice.

From the practical standpoint, the United States could not determine whether to seek certiorari until it knew whether the judgment against it depended solely on the issue of patentability (which we believe merits Supreme Court review) or rested, alternatively, on a factual issue as to an implied contract (which we would not ordinarily consider worthy of certiorari).

As a matter of precedent, the opinion in *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 210, on which respondent relies, noted that the case did not involve either a timely petition for rehearing or a timely motion to amend a previous judgment and carefully avoided any implication that it was overturning the long-established rule that the

time for filing a petition runs from the date of denial of such a timely petition or motion, whether filed by the petitioner or respondent. Cf., *Department of Banking* v. *Pink,* 317 U.S. 264, 266; *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 177. But even if the *Minneapolis-Honeywell* decision were extended to such timely motions or petitions, its reasoning would apply only where the motion to amend or the petition for rehearing related solely to a portion of the judgment wholly separable from the elements taken to this Court for further review. Nothing in the opinion suggests, let alone requires, a procedure whereby a party must determine whether to seek review of a judgment before he knows—by the final disposition of a timely petition for rehearing—whether the judgment also rests on an alternative ground which he may not wish to challenge.

Finally, even if the controlling principles in this area were less clear, there could be little doubt as to the propriety of adopting a practical approach in the case of interlocutory review of decisions of the Court of Claims. For, while there is no question as to the reviewability of the issue of liability in a case such as this prior to final determination of damages (see *United States* v. *Esnault-Pelterie,* 299 U.S. 201, and 303 U.S. 26; *Marconi Wireless Telegraph Co.* v. *United States,* 320 U.S. 1), it is equally clear that review is timely even if it is not sought until after the money judgment is entered. Cf. *United States* v.

Bianchi & Co., 373 U.S. 709. In the instant case, of course, damages have not yet been assessed.[1]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

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[1] Respondents' other contention—that the petition is untimely because of the inadvertent delay of three days in serving them with copies of the petition—is of no substance. While the filing of a petition in the Court within ninety days is a statutory and jurisdictional prerequisite of review (28 U.S.C. 2101), service on opposing counsel as specified by the Court's rules is plainly a non-jurisdictional matter and, in this case, the delay in service nowise prejudiced the respondents' rights.

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